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No. 693

In the

Supreme Court of the United States

OCTOBER TERM 1957

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

v.

B. A. ROBINSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA, JOINTLY OR IN THE ALTERNATIVE

A. L. BURFORD,
800 Texarkana National Bank Building,
Texarkana, Texas.

L. L. BOWMAN, JR.,
401 Citizens National Bank Building,
Greenville, Texas,
Counsel of Record for Petitioner.

WARLICK LAW INC — 1207 MAIN STREET — DALLAS — RI 1-6711

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To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Louisiana & Arkansas Railway Company, prays that a writ of certiorari issue to review jointly and in the alternative the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at

Texarkana entered in the above entitled cause on May 9, 1957, and Motion for Rehearing in said cause being denied by said Court of Civil Appeals on May 30, 1957, and the order of the Supreme Court of the State of Texas entered in the above entitled cause on July 24, 1957, refusing Petitioner's Application for Writ of Error, Petitioner's Motion for Rehearing of such Application for Writ of Error in said cause having been denied on October 2nd, 1957.

I. REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana (R. No. 7), printed in Appendix A hereto, at page 25, is reported in *302 S. W. 2d 665*. The order of the Court of Civil Appeals denying the motion for rehearing (R. No. 10) printed in Appendix B hereto, at page 33, is not reported. The order of the Supreme Court of Texas denying Petitioner's Application for Writ of Error (R. No. 16) printed in Appendix B hereto, at page 34, is not reported.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana was entered on May 9, 1957, Appendix B hereto, at page 35 (R. No. 8). The order denying Petitioner's Motion for Rehearing by said Court of Civil Appeals was rendered and

entered on May 30, 1957, Appendix B hereto, at page 33 (R. No. 10).

2. The order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered and entered on July 24, 1957, Appendix B hereto, page 34 (R. No. 16). The order denying Petitioner's Motion for a Rehearing of its Application for a Writ of Error by the Supreme Court of Texas was rendered and entered on October 2, 1957, Appendix B hereto, at page 35 (R. No. 16).

3. The jurisdiction of this Court is invoked under *28 U. S. C. Section 1257 (3)*, since a right and privilege was specifically set up and claimed by Respondent under the Constitution and Statutes of and under authority exercised under the United States and under 45 U. S. C., 51, et seq.

III. QUESTIONS PRESENTED

1. Whether the interruption of the trial of a Federal Employer's Liability case such as this, by the Trial Judge, for the purpose of using the same jury to try an aggravated rape case, resulting in a hung jury, and then resuming the trial of Civil case was an infringement of Petitioner's right to a trial by jury accorded by the Seventh Amendment to the Constitution of the United States?

2. Whether in a trial in a State Court of an action brought under the Federal Employer's Liability Act the action and trial shall be subject to strict procedural rules promulgated by the Texas Supreme Court or by the liberal rules applicable to such actions as laid down by the decisions of this Court?

IV. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the *Seventh Amendment to the Constitution of the United States* reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Federal Employer's Liability Act, 45 U. S. C., Section 51*, et seq., and more specifically involved in this petition is that portion of *45 U. S. C., Section 51*, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territoies, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

3. *Rule 322, Texas Rules of Civil Procedure*, as follows:

"Grounds of objections couched in general terms—as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court."

4. *Rule 329-b, Texas Rules of Civil Procedure*, as follows:

"Rule 329-b. District Court Cases

"The following rules shall be applicable to motions for new trial filed in all district courts:

"1. A motion for new trial when required shall be filed within ten (10) days after the judgment or other order complained of is rendered.

"2. An original motion for new trial filed within said ten (10) day period may be amended by leave of the court. Said amended motion shall be filed before the original motion is acted upon and within twenty (20) days after the original motion for new trial is filed. Not more than one amended motion for new trial may be filed.

"3. All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed, unless by written agreement of the parties in the case, the decision of the motion is postponed to a later date.

"4. It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after the same is filed. However, at the discretion of the district judge, an original motion or amended motion for new trial may be presented or hearing thereon

completed after such thirty (30) day period. Such delayed hearing shall not operate to extend the time within which the original or amended motion must be determined, unless such time be extended by agreement as provided for in the preceding subdivision of this Rule. In the event an original motion or amended motion for new trial be not presented within thirty (30) days after the date of the filing thereof, and the district judge in his discretion refuses to consider the same or refuses to hear evidence relating thereto, such motion will be overruled by operation of law forty-five (45) days after the same is filed, unless disposed of by an order rendered before said date.

"5. Judgments in the district court shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial. After the expiration of thirty (30) days from the date the judgment is rendered or motion for new trial is overruled, the judgment cannot be set aside except by bill of review for sufficient cause, filed within the time allowed by law. The failure of a party to file a motion for new trial within the ten (10) day period prescribed in subdivision (1) of this rule shall not deprive the district court of jurisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered. The filing of a motion for new trial after ten (10) days have expired and before thirty (30) days have expired since the rendition of the judgment shall not operate to extend the district court's jurisdiction over the judgment for a period of more than thirty days from the date of the rendition of judgment.

"6. In district courts having continuous terms, that is, successive terms in a county throughout the year,

without more than two days intervening between any such terms, the following rules shall apply:

"'(a) A motion for new trial filed during one term of court may be heard and acted upon at the next term of court.

"'(b) No motion for new trial shall be considered as waived or overruled because not acted upon at the term of court at which it was filed, but may be acted upon at any time within the next term of court agreeable to the provisions of this Rule 329-b.

"'(c) Judgments of such courts shall become as final after the expiration of thirty (30) days after the date of judgment or after a motion for new trial is overruled as if the term of court had expired.'

"7. In district courts which do not have continuous terms as defined above, the following provisions shall apply:

"'(a) Whenever a judgment is rendered and the remaining portion of the term does not extend for a period of thirty (30) days after such date of rendition, the term of said court insofar as the case in which the judgment is rendered is concerned shall be automatically extended for a period of thirty (30) days from and after the date of rendition of judgment.

"'(b) If original or amended motions for new trial be timely filed in accordance with this Rule 329-b, then the term of court, insofar as the particular case is concerned, shall be further automatically extended until the expiration of thirty (30) days after the time such motion for new trial shall have been disposed of in accordance with the provisions of this Rule. Promulgated by order of July 20, 1954, effective Jan. 1, 1955."

V. STATEMENT

1. Material Facts

This suit was brought by B. A. Robinson, Respondent herein, against Petitioner under 45 U. S. C., for injuries sustained by him while an employee of Petitioner in active duty. The action was brought under and by virtue of the provisions above referred to and to enforce the rights accorded thereunder.

This was a case involving a disastrous collision between two freight trains operated by Petitioner as they were approaching each other on a single track on a portion of Petitioner's tracks in Hopkins County, Texas. The collision occurred by reason of an error of a train telegrapher in canceling the wrong train order and letting two trains proceed with overlapping meeting points. Train 54, proceeding west toward Greenville, Texas from Shreveport, Louisiana, held an order to meet at Cumby, Texas, some 18 miles west of Como, Texas, while Extra 76 South, the other train involved, held an order to meet Train 54 at Como, Texas, and thus the collision.

Respondent was head brakeman on Train No. 54, and was riding on the engine of such train. Respondent jumped from the engine to avoid being involved in the collision, which occurred several hundred yards on down the track from the point where Respondent jumped. All injuries alleged to have been sustained by Respondent were sustained in the jump and were not caused by the impact of the collision.

The pleadings of Petitioner reflect that the sole issue, other than a general denial, was to the extent of any injuries received by Respondent as a result of his having to escape from the engine to avoid being in the collision.

The pleadings of Respondent invoked the rule of res ipsa loquitur.

Under these circumstances the case proceeded to trial on Tuesday, September 11, 1956. After selection of a jury the testimony was started. This was continued until noon Wednesday, September 12, 1956, when the occurrence shown by Bill of Exception No. One transpired, which is here quoted in full:

"No. 12947

"B. A. Robinson
v.
"Louisiana & Arkansas Railway Company

"In the District Court
"Hopkins County, Texas

"BE IT REMEMBERED that during the course of the trial of the above styled and numbered cause, and on September 12, 1956, the following motion together with the supporting evidence was made by attorney for defendant.

"Now comes the Louisiana & Arkansas Railway Company, defendant in the above styled and numbered cause and moves the Court to declare a mistrial and discharge the jury in this case for the following reasons, to-wit:

"1. The trial of said case was started Tuesday morning, September 11, 1956, and Tuesday was occupied by plaintiff presenting evidence in the case after

selection of the jury; that on Wednesday, September 12, 1956, the case continued in trial and at noon September 12th plaintiff had not completed introduction of said testimony at which time Court was adjourned until 1:15 o'clock P. M.; that at 1:30 o'clock P. M., attorneys representing both parties were requested by the Court to stand aside for the disposition of a criminal matter; that the attorney for the defendant inquired of the district attorney as to whether it was to be tried before the Court or a jury and was informed by the district attorney that he understood it was to be before the court, consequently the attorney for the defendant had no objection at that time; that the first intimation defendant's attorney had that the criminal case was to be tried before a jury was when the trial court turned to the jury and the attorneys in the criminal matter and asked if the jurors in the box was satisfactory to both parties. The Court then being engaged in the disposition of the criminal case the attorney for the defendant without intent to interrupt the Court interposed no objection at that time.

"2. That the evidence in the criminal case was that the defendant was charged with the rape of his young daughter, to which the defendant plead guilty; that out of solicitude for the feelings of the prosecuting witness she was not brought to Court but a confession was read by the district attorney from the defendant to substantiate the State's case. Whereupon, the jury retired at approximately 2:00 P. M. and that at this time, viz. 2:45 P. M. are still out deliberating on the case and have not returned any verdict, although they were instructed by the court to find the defendant guilty and the only matter would be a matter of punishment.

"3. That the rape case submitted to said jury was of a very aggravated nature and highly inflammatory and that the feelings of the jury empaneled to try the

case would be doubly stirred and aroused at having to pass upon and assess the penalty upon a person charged with such crime, and it is apparent at the time of this motion they have been unable to agree upon a penalty and in all probability are having arguments and discussions amongst themselves as to the matter of penalty, all of which is highly prejudicial to the rights of this defendant, and in support of this motion said attorney requests that a complete transcript of the criminal matter be attached hereto as part of this motion so that the Court may be apprised of the exact nature of the case and consider it and its effect upon the rights of this defendant, which will result in an impassioned verdict instead of a calm deliberate verdict, not one affected by any extreme evidence or circumstances.

"Wherefore, defendant respectfully prays that the jury in the civil case be discharged and a new trial declared.

"/s/ L. L. Bowman, Jr.
"Attorney for Defendant.

"COURT: I will overrule the motion.

"MR. BOWMAN: Note our exception.

"/s/ Charles D. Berry
"Judge, 8th Judicial District

"MR. JONES: I would like, whatever the record shows on that matter to show just how the proceedings arose and transpired, it may be the motion shows it, but I would like for the court to elaborate on just how the proceedings arose and came about, and of course we have no more knowledge than Mr. Bowman about the matter.

"COURT: If the matter had been raised I would not have gone into the criminal case.

"MR. BOWMAN: The court says that the jury was recalled and discharged at 3:00 P. M. as being unable to agree and the case proceeded to trial in the civil matter.

"No. 9325

"THE STATE OF TEXAS
V.
"C. C. (RED) WOODARD.

"In District Court, Hopkins County, Texas
"(Eighth Judicial District)
"August Session, 1956.

"Hon. Joe N. Chapman, appointed by the Court to represent the defendant.

"Hon. O. S. Moore, Attorney for State.

* * * * *

"MR. MOORE: We would like to state that the State is waiving the death penalty and not require a venire to try it.

"COURT TO MR. CHAPMAN: Do you agree a special venire may be waived?

"MR. CHAPMAN: Yes, Sir.

"COURT: You understand it might be tried before an ordinary jury?

"A. Yes, Sir.

"COURT: You understand the State waives the right to ask for the death penalty.

"MR. CHAPMAN: Yes, Sir.

"The Court then asked the witness as to any threats or promises which caused him to plead guilty answered

in the negative, whereupon the trial proceeded as follows:

"The indictment was first read:

"MR. MOORE: I would like to introduce his statement, as follows:

"The State of Texas
"County of Hopkins

"I, C. C. (Red) Woodard, after having been warned by J. L. Bryce, Sheriff, the person to whom this confession is made, First, that I do not have to make any statement at all, and Second, that any statement made may be used in evidence against me on my trial for the offense concerning which the confession is herein made wish to freely and voluntarily state the following facts without any compulsion or persuasion of any kind being used on me, and for the sole and only reason that the facts stated are true, viz:

"My name is C. C. (Red) Woodard and I am 38 years of age. I was born in Brashear, Texas and at present I consider the following my home: Brashear, Texas.

"I first started to fool with Nancy Sue Woodard about April 1st 1956, we were down at the barn getting some corn. She just pulled up her dress and started to pee before me at the barn. I just pulled it out and showed it to her and just shook it at her and I rubbed it up and down on her. I jerked it out before I come. This was the first time, the next time was at the garden. She pulled up her dress and peed and said look here. I went over to her again and pulled out my private again and wagged it around again up and down her. The both of us standing up and made it come and stuck in her about so far, about two inches. She never said nothing. I guess she knew what she was doing. We have tried to break her from peeing before us. This

was the last time I have fooled with her and what I have told you is true.

"(The following in pen and ink)

"To add to the above statement I want to state in front of this Grand Jury on this the 28th of August, 1956, that the last time I screwed my daughter was about a week before I was arrested the first time. I put my thing in her about a half inch or an inch that time but didn't come in her.

"/s/ C. C. Woodard

"Witness my hand this the 19th day of May A. D. 1956.

"/s/ C. C. Woodard
"Signature of person making Statement.

"Witnesses:
"J. L. Bryce
"Arlis Hermann

* * * * *

"MR. MOORE: Now we would like to stipulate that Nancy Sue Woodard is a female twelve years of age and the natural daughter of C. C. (Red) Woodard and his wife; that the last time mentioned in his confession he had intercourse with his daughter was the date mentioned in his confession, to-wit, the 12th day of May, 1956, and that this occurred at their home place near Brashear, Texas, which is in Hopkins County, Texas.

"COURT: Now, I believe the further stipulation could be made between you and the defendant that she was not then the wife of this defendant.

"MR. MOORE: That's correct.

"COURT: You understand if the girl was here she would relate these facts?

"MR. MOORE: Yes, Sir.

* * * * *

"DEFENDANT'S ATTORNEY TO DEFENDANT:

"Q. Have you ever been in any trouble of any kind?

"A. No, sir.

"Q. Never have been convicted of any offense?

"A. No, sir.

"TESTIMONY HERE CLOSED.

"I, J. O. Nicholson, official court reporter in and for the eighth judicial district, hereby certify that the above and foregoing is a true and correct transcript of testimony adduced upon the trial of the above mentioned cause.

"/s/ J. O. Nicholson
"Official Court Reporter
"Eighth Judicial District

"The Court overruling the foregoing exception and motion and defendant, through its counsel, excepted, and the defendant here and now tenders this its bill of exception No. 1 to and on account of the ruling of the Court and overruling the defendant's motion for new trial as above set forth, and asks that this bill of exception be approved, signed and filed as a part of the record in this cause.

"/s/ L. L. Bowman, Jr.
"Attorney for Defendant."

At the noon recess on September 12, 1956, Respondent had not completed his testimony in chief, but had used as witnesses, Respondent B. A. Robinson, F. C. Guelfo by deposition, Mrs. Mary White, Dave Sanders and D. S. Barker.

The jury consisted of seven women and five men. At this time Petitioner had introduced no evidence and did not

begin the introduction of its evidence until the following day.

After the dictation of Petitioner's Motion for Mistrial the Court orally instructed the jury as shown on (R. No. 2, page 190).

Again the following morning the Court gave a further written instruction to the jury as shown by Transcript, page 15.

In approving Bill of Exception No. One complaining of this action of the Court the Court qualified the Bill only to the extent of showing his reasons for his actions. The Bill as approved shows that the Motion for Mistrial was made at 2:45 P.M. and the jury had then been out 45 minutes and they were not recalled and discharged until 3:10 P.M.

There is no claim that the attorney for Petitioner consented or agreed to the use of the jury in the criminal case.

The evidence in the criminal case was aggravated, showing a rape by a man 38 years old of his young daughter.

The sole question submitted to the jury in the rape case was the punishment as the Court charged the jury to find him guilty.

The jury retired at about 2 P.M. and were not discharged from the criminal case until 3:10 P.M.

The issue of injury was sharply contested and the only actual evidence of extent of Respondent's injuries came from Respondent himself and Dr. R. B. DeLee.

The Respondent was not confined to bed continuously for any extended period of time. He went fishing during the time between his injury and the date of trial.

Respondent testified that the last day he worked was May 29, 1955. He also testified that this was before he employed counsel in this case.

Dr. R. B. DeLee his medical witness, testified that he first examined Respondent on May 26, 1955, and that Mr. Brian arranged for the examination.

The Witness Dr. T. M. Oxford, a witness for Petitioner, testified that on March 19, 1955, Respondent reported to him that he was experiencing no difficulty and he was discharged from treatment and released to return to work.

The jury found that the injuries sustained by Respondent were occasioned by negligence of Petitioner's employees and assessed his damages at $100,000.00. Upon this verdict the Trial Court rendered judgment for Respondent against Petitioner for $100,000.00, from which judgment the Petitioner duly perfected its appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

Upon appeal the Court of Civil Appeals affirmed the judgment entered by the Trial Court because of the failure of the trial attorney for this Petitioner to comply with the rules of procedure promulgated by the Supreme Court of Texas. The Supreme Court of Texas refused to grant the Petitioner's Application for Writ of Error, and refused to review the Judgment of the Court of Civil Appeals.

2. How Federal Question was Presented in the State Courts

The Constitutional and Federal Questions forming the basis of this petition to this Honorable Court were urged upon the State Courts as follows:

A. *Trial Courts.*

Respondent brought this action squarely under the provisions of 45 U. S. C., 51 et seq. in his allegations:

> "On or about October 12, 1955, and long prior thereto, the defendant was a common carrier by railroad, and while engaging in commerce between the several states of the United States on such occasion had in its employ in such commerce the plaintiff, a resident of Hunt County, Texas. The defendant negligently brought together in head-on collision, two of its trains on its line in Hopkins County, Texas, on such date, so as to inflict severe and permanent injuries on the plaintiff as set out hereinafter. It has agents upon whom service may be made in Hopkins County, Texas."

B. *The Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.*

In the Brief of Petitioner in the Court of Civil Appeals, the following Point was urged:

> "1. The Court erred in overruling Defendant's Motion for a Mistrial because of the action of the Court in recessing this case and using the same jury to hear a very aggravated rape case without consent of either or both parties to this case as shown by defendant's Motion for Mistrial and Bill of Exception No. One."

In the Motion for Rehearing in the Court of Civil Appeals, the following points were urged:

"POINTS OF ERROR ON REHEARING

"POINT OF ERROR NO. 1

"The Court erred in holding that no assignments were brought forward for review, because no amended motion for a new trial was filed, because a proper bill of exception was allowed, filed and brought forward.

"POINT OF ERROR NO. 2

"The Court erred in holding an assignment in an amended motion for new trial is necessary when the error complained of was shown in detail by a bill of exception, allowed and filed.

"POINT OF ERROR NO. 3

"The Court erred in holding it was not error to stop a civil jury case and use the same jury to hear an aggravated rape case without the consent of the parties and then continue with the civil case."

C. *Supreme Court of Texas.*

After Petitioner's Motion for Rehearing was overruled by the Court of Civil Appeals, Petitioner duly filed its Application for Writ of Error to the Supreme Court of Texas. In this Application Petitioner urged the following points of error:

"POINT OF ERROR NO. ONE

"The Court of Civil Appeals erred in holding that no assignments were brought forward for review, because no amended motion for a new trial was filed, because a proper bill of exception was allowed, filed and brought forward.

"POINT OF ERROR NO. TWO

"The Court of Civil Appeals erred in holding an assignment in an amended motion for new trial is necessary when the error complained of was shown in detail by a bill of exception, allowed and filed.

"POINT OF ERROR NO. THREE

"The Court of Civil Appeals erred in holding it was not error to interrupt a civil jury case and use the same jury to hear an aggravated rape case, without the consent of the parties and then continue with the civil case."

The Supreme Court refused Petitioner's Application for Writ of Error and Petitioner filed its Motion for Rehearing again urging the points theretofore urged and also the following:

"The Court of Civil Appeals erred in applying to a Federal Employers' Liability Act case the strict rules of Texas Procedure in contravention to decisions of the Supreme Court of the United States repudiating State Court Rules in Federal Employers' Liability Act cases."

VI. REASONS FOR GRANTING THE WRIT

1. The Decision of the Texas Court of Civil Appeals, and the Refusal of the Supreme Court of Texas to Grant an Application for Writ of Error Because of Failure to Comply with State Rules of Procedure are in Conflict with the Decisions of This Court.

The decision of the Court of Civil Appeals herein is based upon the failure to comply with procedural rules of such state courts. This Court has often held that the rights and

duties accorded by 45 U. S. C. 51, et seq. are Federal rights and are not to be weakened, broadened or changed by local rules.

The case of *Davis v. Wechsler, 44 Sup. Ct. 13* is directly in point. In that case Mr. Justice Holmes held:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.
>
> " 'The State Courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right.' The principle is general and necessary. Ward v. Love County, 40 Sup. Ct. 419. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill v. Grand Lodge Knights of Pythias, 32 Sup. Ct. 822. This is familiar as to the substantial law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. American Express Co. v. Levee, 44 Sup. Ct. 11, decided this day."

The case of *Bailey v. Central Vermont Ry. Inc., 63 Sup. Ct. 1062* is another case by this Court on this point and Mr. Justice Douglas held:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law. In re Second Employers' Liability Cases

(Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A., N. S., 44; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157. And those federal rules have been largely fashioned from the common law (Seaboard Air Line Ry. v. Horton, supra) except as Congress has written into the Act different standards. Tiller v. Atlantic Coast Line R. Co., 318, U. S. 54, 63 S. Ct. 444, 87 L. Ed. ."

For the Court of Civil Appeals in this case to apply the strict rule of noncompliance with a procedural requirement of Texas, is to deny to this Petitioner the benefit of the same liberal rules applied by this Court to the cause of the injured employee. The Act may not on the one hand apply liberal rules laid down by this Court for the enforcement of these rights at the instance of the employee and say to the employer, you have no such rights, and must comply with State rules of procedure, even though they would not be applicable to an employee's action.

2. The Action of the Trial Court and the Texas Court of Civil Appeals and Supreme Court Operated to Deprive This Petitioner of Such a Trial by Jury as is Accorded by Seventh Amendment to the Constitution of the United States.

This Honorable Court has held in numerous cases that to deprive the employee of a right to a trial by jury rather than the Court is error.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 5; (1943);

Bailey v. Central Vermont Ry. Co., 319 U. S. 350 (1943);

Tenant v. Peoria and P. U. Ry. Co., 321 U. S. 29 (1944);

Lavender v. Kurn, 327 U. S. 645 (1946);

Jesionowski v. Boston and Maine R. R., 329 U. S. 452 (1947);

Ellis v. Union Pacific R. Co., 329 U. S. 649 (1947);

Myers v. Reading Co., 331 U. S. 477 (1947);

Wilkerson v. McCarthy, 336 U. S. 53 (1949);

Carter v. Atlantic and St. Andrew's Bay Ry. Co., 338 U. S. 430 (1949);

Moore v. Chesapeake & O. R. Co., 340 U. S. 573 (1951);

Small v. Atlantic Coast Line R. Co., 348 U. S. 946 (1955), reversing 216 F. 2d 842 (4th Cir., 1954);

Cahill v. N. Y., New Haven & Hartford R. Co., 76 S. Ct., 180;

Schulz v. Pennsylvania R. Co., 76 S. Ct., 134 and 608.

To apply a different rule for employers would be to destroy the protection. In this case it is earnestly contended that the interruption of the civil trial, and the use of the jury empaneled to try this case, to hear an aggravated rape case, amounted to a denial to this Petitioner of the right of a trial by a fair and impartial jury unaffected by the

aroused emotions and resentments engendered by a consideration of the rape case and the resultant inability to agree on punishment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. L. BURFORD
800 Texarkana National Bank Building,
Texarkana, Texas.

L. L. BOWMAN, JR.,
401 Citizens National Bank Building,
Greenville, Texas,
Counsel of Record for Petitioner.

APPENDIX A

OPINION OF THE COURT BELOW

COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT TEXARKANA.

No. 6957

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

v.

B. A. ROBINSON,
Appellee.

Appeal from District Court of Hopkins County, Texas.

Plaintiff-appellee, B. A. Robinson, an employee of appellant, sued appellant-defendant, Louisiana & Arkansas Railway Company, for damages sustained on October 12, 1955, when two trains operated by appellant collided (head-on) between the towns of Como and Brashear, in Hopkins County, Texas. Como is south of Brashear. Appellant had issued order to two trains destined to meet upon the same route, one traveling north and one traveling south. The train going south was issued orders to prepare for the meeting of the northbound train at Como. The northbound train was issued orders for meeting the southbound train at Brashear. The two trains collided head-on

between the two places as a result of the negligence of the appellant in issuing such orders. Negligence of appellant was at least orally admitted in this Court. As a matter of fact, denial of such negligence was only made by formal pleading. Trial of the case was to a jury which resulted in a jury verdict and judgment in favor of the appellee in the sum of $100,000.

Motion for new trial was filed by appellant which contained only the following alleged errors: "Because the verdict of the jury is contrary to the evidence. Because the verdict of the jury is contrary to the law." No amended motion for new trial was filed. Such purported assignments of error raise no assignment at all that can be considered by this Court. Rule 322, V. A. T. R. C. P.; Arna v. Gallegos, T. C. A., 284 S. W. 2d 958, no wr. hist., and authorities cited therein.

Appellant attempts to bring forward two points of error. By Point 1 it complains of the action of the trial court because the trial court, during the actual trial of this case, instructed the attorney and parties, both plaintiffs and defendants, in this case, to stand aside as he was going to try a criminal case, which was to be a plea of guilty. The trial court inquired of the State's attorney and the defendant on trial in the criminal case if it would be agreeable to use the same jury trying the civil case. No objection was made by the State's attorney or the defendant, nor either party to this suit objected to the use of the same jury prior to the presentation of the indictment and the

evidence in the criminal case. After the evidence was submitted in the criminal case and the jury had retired to deliberate its verdict, appellant filed a motion for mistrial, contending that it was error to interrupt the trial of the civil case and use the same jury to try the criminal case without the consent of appellant. Appellant contends in this Court that such action was fundamental error, which error, it could raise in this Court for the first time without the necessity of assigning the same in a motion for new trial in the trial court. Such contention as to fundamental error is true. Ramsey v. Dunlop, Tex. Sup. Ct., 205 S. W. 2d 979. Under the same authority, this Court or the Supreme Court can take judicial knowledge of fundamental error without same having been raised. We have concluded that such action was not fundamental error.

The appellant could have made its objection to such proceeding prior to the presentation of any pleading or evidence in the criminal case, and having failed to do so, such objection was waived. We point out that as soon as it was made known to the trial court that appellant objected to the proceedings in the criminal case, he recalled the jury, discharged it from service in the criminal case and instructed them not to consider any of the matters brought out in the criminal proceeding in arriving at their verdict in the civil case. The only case anywhere near the question by any Texas court is the case of Bauer v. Bauer, T. C. A., 145 S. W. 2d 599, no wr. hist. The Bauer case was recessed after the jury was selected and sworn to try the case on October 18, 1939, to October 20, 1939, with the consent and

acquiescence of the party claiming error. On October 19th another civil case was tried involving assault and battery. Eight members of the jury that had already been selected and empaneled to try the Bauer case was selected and empaneled to try the assault and battery case. The court held this was not reversible error. There is a criminal case, Davis v. State, Tex. Crim. App., 40 S. W. 2d 99, which holds that the action of the trial court in using the same jury in a criminal case to hear three pleas of guilty, while the court's charge was being examined, was not error. We find authority that will support the action of the court in this case by courts of other jurisdictions. See Cissel, Talbot & Co. v. Hayden, 41 App. Cases, D. C. 477, 479, 480; Haines v. Thompson, 129 Ill. App., 436; Bennett v. Commonwealth, 106 Va. 834, 55 S. E. 698; Anderson v. Caruthers, 63 Fla. 61, 58 Sou. 131; 88 C. J. S. 24, Sec. 5. We have been cited to only two cases holding to the contrary, Tribble v. Anderson, 63 Ga. 31; and Lyons v. Hamilton, 69 Iowa 47, 28 N. W. 429, 72 Iowa 759, 33 N. W. 655, and we have found no other. Neither of the last two cases holds such action to be fundamental errors. And, these cases appear to have involved full-blown and hotly-contested trials. In this case, the jury was only called upon to fix the punishment because the defendant in the criminal case entered a plea of guilty. It is true that the charge against the defendant in the criminal case was a serious charge for a most heinous crime; that of rape (by consent) on his 12-year-old daughter in which the defendant apparently attempted to justify his conduct on the grounds of invitation. We do not ex-

pressly approve such practice in the trial of civil cases. At least, a better practice would be to secure the consent of the parties.

The other point assigned by appellant in its brief is that the jury verdict and judgment of the trial court is excessive. Even though we hold that the point has not been properly preserved, we have carefully examined the record in this case, and without extensively discussing the evidence, we find the point to be without merit. The age of appellee, 31 years, with an annual income of about $6,000 per year and a life-expectancy of 36 years, coupled with the medical testimony and jury findings, fully support the amount of the judgment.

We have carefully examined the record in this case (it was well tried by counsel for both parties) and we have discovered no error that could have been raised by appellant, in our opinion, in an amended motion for new trial that would justify a reversal of this case.

Appellant's points of error are overruled, and the judgment of the trial court is affirmed.

MATT DAVIS,
Associate Justice.

May 9, 1957.
Filed May 9, 1957.

APPENDIX B

JUDGMENTS AND ORDERS OF THE COURTS BELOW

No. 6957

IN THE
COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT TEXARKANA.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

vs.

B. A. ROBINSON,
Appellee.

OPINION BY MR. DAVIS, A. J.

May 9, 1957

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the Court that there was no error in the judgment of the Court below:

It is therefore ordered, adjudged and decreed that the judgment of the Court below be, and the same is hereby in all things affirmed; that the appellee, B. A. Robinson,

and the intervenor, Dallas Santa Fe Credit Union, do have and recover of and from the appellant, Louisiana & Arkansas Railway Company, a corporation, and of Central Surety and Insurance Company, a corporation, surety upon appellant's supersedeas bond, the full amount as provided in the judgment of the Court below; and, that appellee, B. A. Robinson, and the intervenor, Dallas Santa Fe Credit Union, do have and recover of and from the appellant, Louisiana & Arkansas Railway Company, a corporation, and G. L. Burnett and Gus Morris, sureties upon appellant's appeal bond, all costs in this behalf expended both in this court and the court below; for all of which execution may issue and this decision be certified to the court below for observance.

NO. 9733-6957

IN THE
COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT TEXARKANA.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

vs.

B. A. ROBINSON,
Appellee.

May 30, 1957

ORDER OVERRULING MOTION FOR REHEARING

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing, and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby overruled.

NO. A-6433

IN THE
SUPREME COURT OF TEXAS

LOUISIANA & ARKANSAS RAILWAY COMPANY,

vs.

B. A. ROBINSON,

From Hopkins County, Sixth District

July 24, 1957

ORDER REFUSING APPLICATION FOR WRIT OF ERROR

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the Sixth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicant, Louisiana & Arkansas Railway Company, and surety, Central Surety and Insurance Company, pay all costs incurred on this application.

35

NO. A-6433

IN THE
SUPREME COURT OF TEXAS

LOUISIANA & ARKANSAS RAILWAY COMPANY,
vs.
B. A. ROBINSON,

From Hopkins County, Sixth District

October 2, 1957

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

A copy of the above and foregoing Petition for Writ of Certiorari for Petitioner has been this day duly mailed to the Attorneys of Record for the Respondent, viz., Messrs. Jones, Brian & Jones, Marshall, Texas, and Joe N. Chapman, Sulphur Springs, Texas.

A. L. BU[illegible]

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 693.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

vs.

B. A. ROBINSON,
Respondent.

MOTION TO ADJUDGE DAMAGES TO RESPONDENT FOR DELAY.

FRANKLIN JONES, SR.,
P. O. Box 347,
Marshall, Texas,
JOE CHAPMAN,
Sulphur Springs, Texas,
Attorneys for Respondent.

Of Counsel:

C. A. BRIAN.

R. L. Mercer Hall, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 693.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

vs.

B. A. ROBINSON,
Respondent.

MOTION TO ADJUDGE DAMAGES TO RESPONDENT FOR DELAY.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, B. A. ROBINSON, pursuant to Supreme Court Rule 56, 1, respectfully alleges that there is no ground for granting a writ of certiorari in this case, and that because of the delay involved, and because it is believed that this is an appropriate case therefor, that respondent be granted reasonable damages by reason of the Petition for the writ.

Respondent refers to, and makes a part hereof, his brief in opposition to the Petition for Certiorari, to demonstrate the utter lack of merit of such Petition.

FRANKLIN JONES, SR.,
P. O. Box 347,
Marshall, Texas,

C. A. BRIAN,
P. O. Box 347,
Marshall, Texas,

JOE CHAPMAN,
Sulphur Springs, Texas,

By: C. A. Brian,
Attorneys for Respondent.

I, C. A. BRIAN, one of the attorneys for the Respondent in the above case, hereby certify that a true copy of the foregoing Motion was on this 15 day of January, A. D., 1958, duly mailed to Mr. A. L. Buford, 800 Texarkana National Bank Building, Texarkana, Texas, and to Mr. L. L. Bowman, Jr., 401 Citizens National Bank Building, Greenville, Texas, Counsel of record for Petitioner.

C. A. Brian

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 693.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

vs.

B. A. ROBINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANKLIN JONES, SR.,
C. A. BRIAN,
P. O. Box 347,
Marshall, Texas.
JOE CHAPMAN,
Sulphur Springs, Texas,
Attorneys for Respondent

Of Counsel:
C. A. BRIAN.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 693.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

vs.

B. A. ROBINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opposing the Petition for Certiorari, Respondent says:

Petition Completely Lacking in Merit.

This action under the F. E. L. A. arose because Petitioner negligently brought two interstate trains together in head-on collision, causing injuries to Respondent, a brakeman, who jumped from one of the moving locomo-

tives before the head-on. The Petition, 9, concedes "that the sole issue, other than a general denial, was to the extent of any injuries received by Respondent. * * *." A twelve-man-and-woman jury unanimously determined that "sole issue". The case is just that simple.

Although represented by able Texas trial counsel, the Railroad deliberately chose to ignore the Texas practice (by Supreme Court Rules) requiring the Assignments of Error for appeal to be incorporated in a Motion for New Trial (to allow the trial judge sober reflection on his rulings during the heat of battle), and contented itself with filing a so-called motion for new trial containing no specific assignments (Transcript 20) in the very teeth of a Texas Supreme Court Rule declaring it not worthy of consideration—see Rule 322 (Petition 5).

Petitioner then boldly appealed without assignments of error, asserting error in the action of the trial judge in using the empanelled civil jury to try a criminal case (Petition 18), and asserting excessiveness in the amount of the verdict (Petition 29). The Texas Court of Civil Appeals first applied Rule 322, as was its duty (Petition 26); but nevertheless took up, carefully considered, and overruled the two points of error so asserted, and went even further by examining "the record" but was unable to discover any "error that could have been raised" by the Railroad, even had it filed an "amended motion for new trial" that "would justify a reversal of this case." (Petition 29).

Still asserting the same points (by now expanded to three), the Railroad was denied a writ of error by the Texas Supreme Court; and then, on motion for re-hearing of its application for writ of error, by formal assignment only, and without supporting authority or argument, Peti-

tioner suddenly asserted Texas had been wrong all along in applying what Petitioner denominated the "strict rules of Texas Procedure in contravention to decisions of the Supreme Court of the United States repudiating State Court Rules in Federal Employer's Liability Act cases." If this could be considered as the assertion of a Federal right, it,

(1) Was an incorrect statement of the law, this Brief 6;

(2) Came too late, this Brief 9; and

(3) Ignored the Texas Courts' decisions on the *merits*, this Brief 8.

The magic words "Seventh Amendment to the Constitution of the United States" appear for the *first* time in this case, in the Petition for Certiorari. They avail Petitioner nothing, because,

(1) Petitioner *had* a trial by jury, instead of being *deprived* of it (Tr. 16);

(2) The jury was fairly constituted, this Brief 11 and 12; and

(3) If the jury should not have been used in the criminal case (a) Petitioner's objection was waived because it came too late, this Brief 13, and, (b) The error was harmless, because *Respondent's* counsel was identified as attorney for the rapist (Tr. 32), and the "inflaming" and "arousing" (Petitioner's Brief 21) of the jury would have been directed at Respondent's counsel and Respondent, *not* Petitioner and its counsel.

It will be seen, therefore, that far from a decision by the state courts of "a federal question of substance", Rule 19 for this Court, there was no decision of *any* federal question, substance or otherwise; and, it is respectfully submitted, what *was* decided by State courts should meet

with this Court's approval. The Petition is frivolous. If further elaboration is required, however, we invite the Court's attention to the following:

Misstatements and Inaccuracies in Petition and Brief of Petitioner.

Counsel who signed the petition for certiorari did not participate in the trial of this case, and this apparent unfamiliarity with the record must account for the inaccuracies and misstatements in the petition and brief. They are:

(a) Under "Questions Presented" (Petition 3), the statement that there was a "hung jury" in the criminal case is erroneous. The *ipse dixit* statement of railroad counsel in the motion for nistrial (Tr. 32), that the jury was "unable to agree" did not make the jury "hung", because the jury was recalled while still deliberating; but if counsel was trying to say that, then the statement directly conflicts with the certificate of the trial judge that he "promptly recalled the jury before it reached a verdict" in the criminal case and "discharged" it from that case "as soon as Mr. Bowman (petitioner's trial counsel) apprised the Court he desired to make an objection to the proceedings in the Criminal case" (Tr. 35).

(b) Under "Statement—Material Facts" (Petition 9), it is stated that Bill of Exception No. One "is here (in the Petition) quoted in full". This is erroneous. The trial judge's *qualification* of the Bill as presented to him is entirely omitted from the quotation in the Petition for Certiorari, pp. 9-15). The qualification is a vital part of the Bill of Exceptions (See authority cited this Brief p. 14).

(c) Under the same "Statement" (Petition 16), it is stated that "there is no claim that the attorney for Peti-

tioner consented or agreed to the use of the jury in the criminal case." The same statement is made in Petitioner's brief, p. 13. But the record shows that Petitioner's trial attorney "was present in the courtroom at the time all proceedings in the above mentioned criminal case were had and made no objection to the proceedings in the criminal case whatever until after the jury retired to consider its verdict" (Tr. 35).

(d) Respondent, of course, considers that the last paragraph of p. 16 of the Petition, and the first four paragraphs of p. 17 (repeated in brief of Petitioner, p. 14), are no part of the "Material Facts" as described by Petitioner, but are simply inserted in a desperate effort to prejudice this Court against Respondent. No claim of excessiveness was properly assigned below, and the claim as made was rejected. No such claim is assigned here at all. We do not dignify the assertions referred to by answering them.

(e) The statement, last paragraph (Petition 17) (reiterated, last paragraph, Brief 20), that the intermediate Texas Appellate Court affirmed on the procedural failure of the railroad to properly preserve its claimed errors hardly rises to the level of a half-truth. Reference to the opinion of the Texas Court of Civil Appeals readily demonstrates that after holding that the railroad had failed to follow the procedural rules for preserving claimed error, that Court went further and passed directly on (and overruled) both points of error presented to it (Petition 26-29), and went even further by "carefully" examining "the record", in spite of which that Court could discover "no error that could have been raised" by the railroad "in an amended motion for new trial that would justify a reversal" of the case (Petition 29).

(f) The statement that the Motion for Mistrial (Tr. 10), was "instantly" made (Brief 25), is not true. See Tr. 35.

ARGUMENT.

I.

Petitioner's Failure to Comply with Texas Procedural Rules Fatal to Its Appeal.

Rule 374, Tex. Rules Civil Procedure states:

> "The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required, shall be considered as waived."

So also the "statement of the points upon which the appeal is predicated" is required to be "germane to one or more assignments of error when assignments of error are required," and it is further directed that the assignments should be cited by "reference (only)", Rule 418, T.R.C.P. Clearly, under Rule 322, cited by Petitioner in its Petition 5, the only motion for new trial filed by petitioner was legally insufficient under Texas practice. It therefore went to the Texas Court of Civil Appeals, without any vehicle for appeal, except fundamental error. Petitioner is not contending that there was any fundamental error in the case. But, it blandly brushes these obstacles aside by its assertion that the Texas Courts "in a trial of a Federal Employers' Liability Act case may not invoke strict rules of procedure * * *". (Brief, p. 24).

We agree with Petitioner that a *Federal right, asserted* under the Employers' Liability Act, cannot be taken away under the guise of local practice and procedure. But that is an entirely different proposition from the one here

presented that local practice and procedure is swept away merely because the action arose under a federal statute. Mr. Justice Pitney long ago said in *Chesapeake & O. R. Co. v. DeAtley*, 241 U.S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, 1021:

> "Although the Federal action was based upon a federal statute (F. E. L. A.), it was triable and tried in a state court; hence, local rules of practice and procedure were applicable. *Central Vermont R. Co. v. White*, 238 U.S. 507, 511, 59 L. Ed. 1433, 35 S. Ct. 865, 9 N.C.C.A. 265; *Minneapolis & St. L. R. Co. v. Bombolis*, # 478, this day decided (241 U.S. 212, *ante* 961, 36 S. Ct. 595)."

Here, bear in mind that no federal right was ever even *claimed* until at least the motion for rehearing on application for writ of error to the Supreme Court of Texas, and no claim of constitutional infringement was made until this Petition for Certiorari. Under these circumstances, the case of *Atlantic Coast Line R. Co. v. Mims*, 242 U.S. 532, 61 L.Ed. 476, 37 S. Ct. 188, 17 N.C.C.A. 349, is considered directly in point. The action had been brought by the plaintiff under the theory that the death of the intestate occurred in intrastate commerce, and the action was therefore brought under a South Carolina statute in a state court there. The case went to the Supreme Court of South Carolina, was reversed and sent back for a new trial, and the plaintiff put on her proof without the question of interstate commerce ever having been raised at which point, the railroad offered to prove that the deceased was engaged in interstate commerce at the time of his death. The trial court rejected this proffer of testimony on the ground that it came too late and was not relevant to any issue tendered by the pleadings. No application was made for leave to amend by adding the claim under federal law. In this situation, Your Honors held:

"While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet, the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of " by the State Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review (*Baldwin* v. *Kansas*, 129 U.S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 41 L. Ed. 1149, 17 S. Ct. 709)."

II.

The Texas State Courts Considered Petitioner's Case on Its Merits.

After first holding that the railroad was before it without assignments of error, the Texas Court of Civil Appeals in its opinion, went further, took up both assignments presented by the railroad in its brief to that Court (neither of which involved a federal question), and overruled them on their merits; and the court then, with the utmost spirit of fairness and candor, examined the entire record in an attempt to find some error or mistake which could have been the basis for an appeal, but found none. On this record, the Texas Supreme Court refused the application for writ of error, N.R.E.; and it seems manifest, that without regard to the failure of the railroad's experienced and skilled Texas trial counsel to comply with the Texas Rules of Civil Procedure in the appeal of his case, the appeal was found to be totally without merit, on any ground presented.

III.

Petitioner Has No Right of Review, Because Claim of Federal Question on Application of State Court Procedure Was Raised for the First Time in Petition for Rehearing on Application for Writ of Error in Texas Supreme Court, and Claim of Constitutional Infringement First Made on This Petition for Certiorari.

It is "elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this (Supreme) court", *Manhattan L. Ins. Co.* v. *Cohen*, 234 U.S. 123, 34 S. Ct. 874, 58 L. Ed. 1215, 1253; and this Court is without jurisdiction, in reviewing a State Court's decision, to consider a Federal question not passed upon by the State Court nor properly presented to it for decision, *Congress of I. O.* v. *McAdory*, 325 U.S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741, 1745.

Considered in point is *McCorquodale* v. *Texas*, 211 U.S. 432, 29 S. Ct. 146, 53 L. Ed. 269. There, an attempt to raise a federal question was first made in a motion for rehearing filed with the Texas Court of Criminal Appeals, the Texas court of last resort in criminal matters. The motion for rehearing was denied in language almost identical with language used by the Supreme Court in the present case in denying Petitioner's motion for rehearing on application for writ of error (See Petition 35). Mr. Justice McKenna said:

> "This Court has decided many times that it is too late to raise a federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision (Citing cases). It is true that we have also decided that, if the court entertains the motion and

passes on the federal question, we will review its decision. But it must appear that the court has done so (Citing cases). It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion."

In fact, even where the order of the state court of last resort recites "mature consideration", it cannot be said that the court passed on the federal question asserted (See *Forbes* v. *State Council*, 216 U.S. 396, 30 S. Ct. 295, 54 L. Ed. 334; and *Consol. Turnp. Co.* v. *Norfolk and O. V. R. Co.*, 228 U.S. 326, 33 S. Ct. 310, 57 L. Ed. 857).

We cite the following additional cases, several of which involved a claim of Federal Constitutional infringement: *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 236; *Chicago, F. & L. R. Co.* v. *McGuire*, 196 U.S. 128, 25 S. Ct. 200, 49 L. Ed. 413, 415, and the annotation found 49 L. Ed. 413; *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 43 S. Ct. 288, 67 L. Ed. 556, 557, and the annotations, 67 L. Ed. 556; *Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1480, 89 L. Ed. 2092, 2100; *Herndon* v. *Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, 1532, and the annotations, 79 L. Ed. 1530.

Bear in mind also, that the Texas Supreme Court, under its own Rules, *could not* consider the supposed Federal question, first presented on motion for rehearing on application for writ of eror, since such Federal question had neither been presented to the trial court by motion for new trial nor assigned as error on motion for rehearing in the Court of Civil Appeals, all as required by Texas Rule of Civil Procedure 469 (c). Compare *Congress of I. O.* v. *McAdory*, 89 L. Ed. 1741, 1745.

It will be noted, that the claim that Texas Procedural Rules did not apply to this F. E. L. A. case, was first asserted on motion for rehearing of the application for writ of error after the original denial of same, which was too late under the above authorities; and that the claim of constitutional infringement of the Seventh Amendment was first raised by this petition for certiorari. The state courts were accordingly denied all opportunity by Petitioner to pass on its alleged Federal questions. They come too late here, and the foregoing cases by this Court clearly so hold.

IV.

The Seventh Federal Constitutional Amendment Was Not Infringed by the Trial Judge's Use of the Jury to Dispose of a Criminal Matter.

Petitioner attempts to twist the Seventh Amendment guarantee of trial by jury into a guarantee against what it calls "a disturbed and inflammatory jury" (Petition 18). This will not do.

The cases cited in the opinion of the Court of Civil Appeals, are very much in point in upholding the action of the trial judge in this instance in using the F. E. L. A. jury to hear a criminal matter and include one Federal case from the District of Columbia. We have no doubt from experience that U. S. trial judges empanel the personnel of one jury venire in two or more cases regularly. They must do so to dispatch the business of their courts just as the trial; judge here was trying to do. But in any event, Petitioner, while not necessarily disagreeing that the trial judge in the present case could have used the jury on a simple forgery or burglary case, asserts that the rape case here involved was "a case of such revolting nature" that it "could not help but arouse the indignation of this jury and particularly the women members of the jury."

(Brief of petitioner, p. 20). Well, to begin with, the indignation must have been directed against Woodard, the confessed rapist, and it fell to the lot of Mr. Chapman, one of Respondent's attorneys, under his duties as officer of the Court by appointment, to defend this self-confessed rapist, who aroused such indignation. How that could have harmed the Railroad, it does not explain. Petitioner has no complaint by assignment at the excessiveness of the verdict; yet, its Brief, p. 21, seems to assert that harm was done it by "the size of the verdict". It wants this Court to consider something it has not legally asked the Court to consider; and, of course, the verdict was not excessive, as the Court of Civil Appeals directly held (Petition 29).

It will not do, as Petitioner attempts (Brief 24), to brush aside the cases supporting the action of the trial judge in this case by saying they "occurred many years ago". They were and are authoritative, and they were the standards by which the trial court acted as a trial court always must. In any event, the law on the point is now settled so far as Texas is concerned, by the appellate approval of the trial judge's action here.

V.

Petitioner Had Trial by Jury. The State of Texas Infringed No Federal Right of Petitioner in Granting Jury Trial According to Its Determination of What Constituted a Fair Jury.

The Seventh Amendment only guarantees Petitioner a trial by jury. It *had* trial by jury. That ought to end the inquiry; but we go further:

We confidently assert that the right of trial by jury, guaranteed by the Seventh Amendment, does not require

a state court, when enforcing rights granted under the Employers' Liability Acts, to grant jury trial according to the course of the common law, but only to grant such jury trial by uniformly applying the law of the State as to what constitutes a fair and impartial jury. It will be borne in mind that the state courts below have held the jury in the present case to have been fairly constituted, and that determination is the law of the case so far as Texas is concerned, for this case and all others like it.

In *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961, Ann. Cas. 1916E, 505 L.R.A. 1917A, 86 (and its accompanying cases, *Chesapeake & O. R. Co.* v. *Gainey*, 241 U.S. 494, 36 S. Ct. 633, 60 L. Ed. 1124; *Chesapeake & O. R. Co.* v. *Kelly*, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1117, L.R.A. 1917F, 367; *St. L. & S. F. R. Co.* v. *Brown*, 241 U.S. 223, 36 S. Ct. 602, 60 L. Ed. 966; *Chesapeake & O. R. Co.* v. *Carnahan*, 241 U.S. 241, 36 S. Ct. 594, 60 L. Ed. 979, and *Louisville & N. R. Co.* v. *Stewart*, 241 U.S. 261, 36 S. Ct. 586, 60 L. Ed. 989), it was asserted, in F. E. L. A. cases, that state statutes allowing certain types of majority verdicts in civil cases conflicted with the Seventh United States Constitutional Amendment granting the jury trial known to common law. This Court, while conceding the validity of the argument that the jury known to common law was a jury which concurred unanimously in its verdict, nevertheless held that the Seventh Amendment was not infringed when a state court, in F. E. L. A. cases, substituted its own concept of jury trial by allowing majority verdict. Mr. Justice Reed, in *Brady* v. *Southern R. Co.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239, 242, summed up the rationale of these cases by pointing out:

> "It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury

according to the requirements of the Seventh Amendment (Citing the *Bombolis* case)."

If therefore, Respondent conceded (as he certainly does not) that the use by a Federal trial judge of a duly empanelled F. E. L. A. jury to dispose of criminal business on his docket would constitute that jury "unfair and partial", it by no means follows that the state of Texas would be required to concede that a jury so drawn according to state usages would become unfair and partial. The state of Texas had determined that this was a fair and impartial jury under its concepts; and there being nothing unreasonable about that determination, this Court and Petitioner are bound by that finding.

VI.

Petitioner Waived Any Complaint at the Action of the Trial Court in Using the Jury in the Criminal Case.

Railroad appellate counsel's unfamiliarity with the record causes him to completely omit the qualifications of the trial judge to the Bill of Exceptions, said to be "quoted in full", in the Petition. As said by the Texas Supreme Court in *Texas Textile Mills* v. *Gregory*, 142 Tex. 308, 177 S.W. 2d 938, 940:

> "It is the settled law that when a party accepts a bill of exceptions qualified by the trial court, the qualifications become a part of the bill itself, and are binding on the party who accepts and files the same. *San Antonio Traction Co.* v. *Settle*, 104 Tex. 142, 135 S.W. 116; *M. System Stores, Inc.*, v. *Davenport*, Tex. Civ. App., 36 S.W. 2d 243; *South Texas Cotton Oil Co.* v. *Bough*, Tex. Civ. App., 68 S.W. 2d 539; 3 Tex. Jur., p. 657, Sec. 464." (See also *Tucker* v. *Slovacek*, Tex. Civ. App., 234 S.W. 2d 254, er. ref. n. r. e; *Craddock* v. *Humble Oil & Ref. Co.*, Tex. Civ. App., 234 S.W. 2d

137, er. ref. n. r. e.; *Harris* v. *Cochran*, Tex. Civ. App., 288 S.W. 2d 814, er. ref. n. r. e.; *Taylor* v. *Taylor*, Tex. Civ. App., 272 S.W. 2d 636, er. ref. n. r. e.; and *Cavaness* v. *General Corp.*, 272 S.W. 2d 595, 600, affirmed 283 S.W. 2d 33).

The qualification to the Bill shows that a jury could not be waived, this being a capital crime; that trial counsel for the Railroad was present in the courtroom at the time all proceedings in the criminal case were had and made no objection to the proceedings in the criminal case whatever until after the jury retired to consider its verdict; that as soon as the railroad made a motion for mistrial, the Court recalled the jury before it had arrived at a verdict and discharged it; and that had an objection been made to the criminal proceedings at the time of its beginning, the Court would have sustained such objection and would have proceeded no further in the criminal matter (Tr. 35).

Bear in mind that Petitioner's trial counsel was a skilled and experienced Texas Attorney. He well knew that it was the *duty* of the trial judge to hear courteous objections to the procedure of the trial judge, whether tenable or not (*McLellan* v. *Brownsville Land & Irrigation Co.*, 46 Tex. Civ. App. 249, 103 S.W. 206) and yet counsel sat by while the jury was empanelled in the criminal case, the indictment was read, and the confession was read, as well as all other proceedings transpiring before the jury retired (Tr. 32-35). Clearly, Petitioner waived its objections to the course taken, 41B Tex. Jur. 160, Sec. 134.

CONCLUSION.

At the risk of repetition, we assert again that the sole issue in this case was the extent and severity of Respondent's injuries and what amount of money would, in law,

compensate him therefor. The verdict finding the amount was within the peculiar province of the jury under either state or federal practice, subject only to review in the state court for excessiveness, or to review in this court for "monstrosity" (*Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683). The claim of excessiveness has long since been abandoned.

We repeat again that the petition for certiorari is frivolous and pray its denial; and so believing, we have filed, simultaneously with this brief, a motion under Supreme Court Rule 56, Paragraph 4, praying that this court adjudge to the respondent reasonable damages for his delay by reason of the application for the writ.

FRANKLIN JONES, SR.,
P. O. Box 347,
Marshall Texas,

C. A. BRIAN,
P. O. Box 347,
Marshall, Texas,

JOE CHAPMAN,
Sulphur Springs, Texas,

By: C A Brian,
Attorneys for Respondent.

I, C. A. BRIAN, one of the attorneys for the Respondent in the above case, hereby certify that a true copy of the foregoing brief was on this 15 day of January, A. D. 1958, duly mailed to Mr. A. L. Buford, 800 Texarkana National Bank Building, Texarkana, Texas, and to Mr. L. L. Bowman, Jr., 401 Citizens National Bank Building, Greenville, Texas, Counsel of record for Petitioner.

C A Brian